Supreme Court, U.S.
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No. 10-432

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In The
Supreme Court of the United States

SHERIFF DEWAYNE BEGGS,
JEANNE ANN BECK, KENNETH ALBRECHT
AND MICHAEL STEVENSON,

Petitioners,

v

ESTATE OF EVA JUNE CROWELL, DECEASED,
by and through ANNA M. BOEN,
Personal Representative,

Respondent

**On Petition For A Writ Of Certiorari To
The Supreme Court Of The State Of Oklahoma**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether any unconstitutional custom, policy or act of, or knowledge by, the Sheriff, as the final policymaker, was alleged or shown.

2. Whether the Supreme Court of Oklahoma's opinion conflicts with important and settled federal constitutional questions regarding the principle that the doctrine of respondeat superior does not apply in cases brought pursuant to 42 U.S.C. § 1983.

3. Whether the Supreme Court of Oklahoma's opinion conflicts with the state court of last resort of numerous states with regard to principles of respondeat superior under 42 U.S.C. § 1983.

4. Whether the Supreme Court of Oklahoma's opinion conflicts with decisions of the United States Supreme Court, and of the United States Courts of Appeals.

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The opinion of the Supreme Court of Oklahoma (App. 1-App. 27) is published at 237 P.3d 134 (Okla. 2010). The opinion of the Court of Civil Appeals of the State of Oklahoma (App. 28-40) was not a published opinion. The journal entry of District Court of Cleveland County (App. 41-42) was not a published order or opinion.

JURISDICTION

The Supreme Court of Oklahoma filed its decision on January 26, 2010. That court denied Petitioner Beggs' petition for rehearing on July 1, 2010. App. 43. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE AND FACTS

Petitioners Sheriff DeWayne Beggs and jail employees Jeanne Ann Beck, Kenneth Albrecht and Michael Stevenson, in their official capacities, file

this Petition For a Writ of Certiorari to the Supreme Court of Oklahoma.

On May 22, 2005, plaintiff Anna Boen, the personal representative of the Estate of Eva June Crowell ("Crowell") filed a petition in the District Court of Cleveland County. The petition included claims brought pursuant to 42 U.S.C. § 1983. The petition alleged that the Cleveland County Board of Commissioners ("Board of Commissioners"), Sheriff DeWayne Beggs, and jailers in the Cleveland County jail were responsible for the death of Crowell. The lawsuit alleged that Crowell's death was caused by the jailers' delay in responding to Crowell's asthma attack suffered while she was in the Cleveland County jail.

The defendants filed a motion for summary judgment on February 9, 2007 with respect to the 42 U.S.C. § 1983 claims, which were the only claims that remained in the lawsuit. On May 17, 2007, the district court filed a journal entry granting summary judgment in favor of Sheriff Beggs and jailers Albrecht, Beck and Stevenson in the their individual capacities, but denying the motion for summary judgment against Beggs and those deputies in their official capacities. App. 16. Two other jailers who were sued, Cummins and Easley, were never served. This summary judgment order was not appealed by Crowell, and it is not a subject of this Petition For a Writ of Certiorari.

Subsequently, Sheriff Beggs and Albrecht, Beck and Stevenson, in their official capacities, (herein collectively referred to as "Sheriff Beggs") filed a

second motion and brief for summary judgment on March 7, 2008. In his second motion and brief for summary judgment, at 12, Sheriff Beggs argued that in an action regarding alleged deliberate indifference of the Cleveland County Sheriff's Office ("CCSO"), a county or municipality cannot be held liable under § 1983 for the constitutional torts of its employees pursuant to a respondeat superior theory.

In a journal entry filed on September 5, 2008, the district court ruled that "Plaintiff's proffered evidence does not show 'deliberate indifference' or raise a question of fact sufficient to withstand a demurrer to the evidence/motion for directed verdict on the issue of deliberate indifference." App. 41-42. The district court granted the second motion for summary judgment as to all defendants, including Sheriff Beggs and the Board of Commissioners. App. 42.

On October 6, 2008, Crowell filed a petition in error with the Supreme Court of Oklahoma, appealing the district court's granting of summary judgment in favor of Sheriff Beggs. This was Crowell's appeal of the granting of summary judgment in favor of the Board of Commissioners and Sheriff Beggs in its journal entry of a journal entry filed on September 5, 2008. The petition in error (in Exhibit B, Summary of the Case), stated that the appeal was with regard to the September 5, 2008, journal entry. There was no appeal of the journal entry of May 17, 2007 that granted summary judgment in favor of Sheriff Beggs and jailers Albrecht, Beck and Stevenson in their individual capacities.

The appeal was filed pursuant to an accelerated procedure where the appellate court reviews only the briefs filed in the district court; no new briefs are filed on appeal. Okla. Sup. Ct. R. 1.36. On October 29, 2008, the Supreme Court assigned the appeal to the Oklahoma Court of Civil Appeals. On December 18, 2008, the Oklahoma Court of Civil Appeals, in an unpublished opinion, affirmed the granting of summary judgment in favor of the Board of Commissioners and Sheriff Beggs, in his official capacity. App. 28-40. The court stated that Sheriff Beggs asserted that he had no personal involvement in the incident that allegedly caused Crowell's death. App. 31. The court noted that "[f]or a supervisor to be liable for a § 1983 claim the plaintiff must show an 'affirmative link' between the supervisor defendant and the alleged constitutional violation." App. 32 n.21.

Crowell filed a petition for a writ of certiorari with the Supreme Court of Oklahoma, which granted certiorari. On January 26, 2009, the Supreme Court reversed the opinion of the Oklahoma Court of Civil Appeals, in an opinion that has been published as *Estate of Crowell v. Board of County Commissioners*, 237 P.3d 134 (Okla. 2010). The court upheld the granting of summary judgment in favor of the Board of Commissioners, but reversed the summary judgment against Beggs and the jailers, and held that the official capacity § 1983 action could proceed to trial. App. 26.

REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT OF OKLAHOMA'S APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD UPON SHERIFF BEGGS IN HIS OFFICIAL CAPACITY CONFLICTS WITH SETTLED 42 U.S.C. § 1983 JURISPRUDENCE OF THE UNITED STATES SUPREME COURT AND OF FEDERAL COURTS OF APPEAL IN THIS COUNTRY; THE DOCTRINE OF RESPONDEAT SUPERIOR DOES NOT APPLY TO COUNTIES OR MUNICIPALITIES IN SECTION 1983 CASES.

Petitioner Sheriff Beggs contends that the Supreme Court of Oklahoma misapplied settled 42 U.S.C. § 1983 jurisprudence in its opinion reversing the granting of summary judgment. That court in essence held that the Sheriff of Cleveland County, DeWayne Beggs, in his official capacity, could be held liable under that statute without a showing of an unconstitutional custom or policy caused by Beggs, or his involvement in or awareness of an unconstitutional act, which was the cause of Crowell's death.

The present case is an official capacity § 1983 case against Sheriff Beggs and jailers employed in his jail. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). *See also Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (stating that a suit against a public official in his official capacity is actually a suit

against the entity for which the official is an agent). Official-capacity suits are actions against the governmental entity of which the official is a part. *Cook ex rel. Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1116 (11th Cir. 2005). Therefore, the present case is in reality a § 1983 case against Cleveland County.

In the present case, its opinion, the Supreme Court of Oklahoma cited the Tenth Circuit case of *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988). App. 22. In *Meade*, the Tenth Circuit held that a plaintiff may meet his burden in a § 1983 case by showing that the "'supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation.'" *Id.* at 1528. App. 23. In the present case, however, the Supreme Court of Oklahoma misapplied *Meade*. The Oklahoma Supreme Court cited Okla. Stat. tit. 57, § 52 in support of its imposition of liability upon the county. This Oklahoma statute states that the sheriff of each county has a statutory duty to provide medical care when required and all necessities for the comfort and welfare of its prisoners. App. 22-23. The Oklahoma court then stated that under this statute, "[t]he sheriff of each county in Oklahoma has a statutory duty to provide 'medical care when required, and all necessities for the comfort and welfare of prisoners.'" App. 22.

However, there is no showing that Sheriff Beggs knew of the situation involving the fatal asthma attack, or had in effect an unconstitutional policy that

caused Crowell's death. The Supreme Court of Oklahoma's opinion, therefore, means that Sheriff Beggs, or any other sheriff in Oklahoma would be held strictly liable for the actions of his subordinates, even if the sheriff did not cause or personally be deliberately indifferent to the unconstitutional violation that gave rise to a jail inmate's death.

Even though Crowell failed to show that Sheriff Beggs violated any constitutional or federal law, or was deliberately indifferent to a constitutional violation, the court in essence held that he (which in an official capacity lawsuit means the county) could be held liable under § 1983.[1] Therefore, the ruling of the Supreme Court of Oklahoma imposes respondeat superior liability upon the Sheriff in this case and upon all sheriffs in the State of Oklahoma.

This is not the law under 42 U.S.C. § 1983 principles. Sheriff Beggs must be found to have been deliberately indifferent himself, or have a custom or policy that was the cause of the alleged constitutional deprivation. This did not happen in the present case.

Nor did the Supreme Court of Oklahoma hold or find that there had been a unconstitutional deficiency in training that was the cause of Crowell's death. *See City of Canton v. Harris*, 489 U.S. 378, 390-92 (1989)

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[1] The Supreme Court of Oklahoma cited the regulation of the Oklahoma Department of Health that required the inhaler to be separated from the prisoner, but did not hold that this policy was unconstitutional as it certainly is not. App. 6-7.

(holding that inadequate police training could serve as a basis for municipal liability under § 1983 when the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact).

In the present case, there was no showing that the policymaker for the jail, Sheriff Beggs, was deliberately indifferent to Crowell's medical condition, and no showing that he knew of or actually drew the inference that there was a substantial risk to Crowell, the prisoner. *See Parrish v. Ball*, 594 F.3d 993, 997-1001 (8th Cir. 2010) (holding that in this § 1983 action brought by a detainee against a sheriff in his official capacity, the court held that the sheriff was not liable for the deputy's sexual assault upon the detainee for inadequacy of training that was not likely to result in the sexual assault).

In its opinion, the Supreme Court of Oklahoma stated that "a reasonable fact-finder could conclude that the jail personnel and the Sheriff acted with deliberate indifference to Ms. Crowell's serious medical needs." App. 26. However, it should again be noted that Sheriff Beggs was not present at the time of the events in question,[2] and the Supreme Court of Oklahoma did not set forth anything that Sheriff Beggs

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[2] In his affidavit filed with the district court, Sheriff Beggs swore that he was not present at the jail on the night of Crowell's death. Def.'s Second Motion and Brief for Summary Judgment, Attach. I, Aff. of Beggs, ¶ 2.

did or did not do, either personally or by policy, that was an unconstitutional act that caused Crowell's death. Therefore, Beggs could not have been deliberately indifferent. In a way that conflicts with § 1983 jurisprudence, the Oklahoma Supreme Court cited Okla. Stat. tit. 57, § 52, in effect holding that a state statute can make the Sheriff, and the County, strictly liable for what happens in the jail regarding medical care.

Sheriff Beggs respectfully submits that this is not the law under 42 U.S.C. § 1983, which is determined only by federal constitutional principles; state substantive law is irrelevant in interpreting and applying § 1983. In *Coon v. Ledbetter*, 780 F.2d 1158, 1162 (5th Cir. 1986), the Fifth Circuit held that although Mississippi state law rendered a sheriff liable for his deputies' acts, this more expansive provision of Mississippi law does not override "the distinctly restrained policy" of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *See also Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 591 n.2 (10th Cir. 1999) ("[a] state statute does not and cannot define the scope of constitutional rights.").

Similarly, a state statute cannot define § 1983 principles, or limit or expand its scope. *See, e.g., Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (holding that there is no requirement that a plaintiff exhaust state remedies prior to filing a § 1983 lawsuit). *See also Heck v. Humphrey*, 512 U.S. 477 (1994) (same holding).

This principle of the supremacy of federal law in § 1983 cases was re-affirmed by the United States Supreme Court in *Haywood v. Drown*, ___ U.S. ___, 129 S. Ct. 2108 (2009). There the Court held invalid, as a violation of the Supremacy Clause, a state statute that required that a prisoner's claim against a correctional officer would be dismissed for want of jurisdiction, and the prisoner would be left to pursue a damages claim against the state in the court of claims, which was a court of limited jurisdiction. In *Haywood*, the Court held that under the Supremacy Clause, that state courts, are required to follow federal jurisprudence in deciding § 1983 cases. *Id.* at 2119. "In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C. § 1983." *Id.* at 2112.

Furthermore, a State cannot in any way impede the right to maintain a § 1983 action with state procedural requirements. *Felder v. Casey*, 487 U.S. 137 (1988) (in a state § 1983 action, state notice-of-claim provision is preempted by § 1983 and may not be a prerequisite to filing a § 1983 lawsuit). In the present case, Crowell failed to demonstrate that Sheriff Beggs, the policymaker for the jail had subjective awareness of a serious harm or medical condition that existed, and was deliberately indifferent to that awareness.

It is also significant that this Court has held that the states must permit § 1983 actions to be brought in their courts; federal and state courts have concurrent jurisdiction over 42 U.S.C. § 1983 actions.

Howlett v. Rose, 496 U.S. 356, 358, 380-81 (1990). In *Howlett*, the Court held that a § 1983 lawsuit alleging that an assistant principal made an illegal search of a high school student's car was required to be entertained in a state court because, under the Supremacy Clause, the Constitution and laws passed pursuant to it, are as much laws in the states as laws passed by the state legislature. *Id.* at 367. The Court in *Howlett* held that in a § 1983 state court action the state could not raise the defense of sovereign immunity under state law. *Id.* at 383.

In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985), the Supreme Court held that a municipality could not be held liable based solely on a single incident of misconduct by an officer, who shot and killed a person fleeing from a bar. The Court noted that in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the Court held that a city could not be held liable under § 1983 based on theories akin to respondeat superior. *Id.* at 818.

The cases involving the application of deliberate indifference principles to prisoners are consistent with the decision of the Oklahoma Court of Civil Appeals in the present case, which was reversed by the Supreme Court of Oklahoma. App. 34-35. Significantly, in *Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009), the Tenth Circuit noted that a prison official cannot be liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate's health or safety. *Id.* at 1089. The

official must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Id.* But the present case, Crowell made no showing that Sheriff Beggs, the policymaker for the County with regard to the operation of its jail, was deliberately indifferent to Crowell's serious medical needs, or that his action or inaction caused her death. Therefore, Beggs, and Cleveland County, cannot be held liable under 42 U.S.C. § 1983.

Sheriff Beggs respectfully contends that the Supreme Court of Oklahoma erroneously applied the doctrine of respondeat superior to the Sheriff's Office, a principle that cannot be used in a 42 U.S.C. § 1983 action to impose liability upon counties or municipalities. Governmental entities cannot be held liable under § 1983 for the unconstitutional acts of the employees unless those acts were carried out pursuant to an official custom or policy. *Grieveson v. Anderson*, 538 F.3d 763, 771 (7th Cir. 2008). In *Grieveson*, a pretrial detainee did not demonstrate that the alleged practice at the county jail of dispensing an inmate's entire drug prescription at one time was a widespread practice reflective of policy choice made by the county sheriff as required to establish his § 1983 claim against the sheriff in his official capacity. *Id.* at 773-75. The inmate did not establish the frequency of the claim practice or indicate how many such disbursements to others that he had witnessed, in his personal experiences, in which he was given his full prescription on four occasions and he asked, once,

to receive his pills one at a time. This did not show a widespread practice or permit the inference that the county approved, acquiesced, or encouraged the practice. *Id.*

In an action under 42 U.S.C. § 1983, the plaintiff must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997). "[A] municipality may not be held liable under § 1983 solely because it employs a tortfeasor." *Id.* at 403. *See also Leatherman v. Tarrant County*, 507 U.S. 163, 166 (1993) ("a municipality cannot be held liable under § 1983 on a respondeat superior theory."); *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004) ("McDowell cannot rely upon the theory of *respondeat superior* to hold the County liable.") [Emphasis original].

Counties and municipalities can be held liable under § 1983 if they establish a policy or custom that causes a constitutional deprivation. *Brown*, 520 U.S. at 402-03. The official policy, however, must be the moving force behind the constitutional violation. *Id.* at 404. Municipal liability may also be found when the official responsible for establishing final policy with respect to the subject matter at issue has made a deliberate choice to follow a course of action. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). *See also Brown*, 520 U.S. at 405 (stating that action taken or directed by the governmental entity or its authorized decisionmaker will also determine that the municipal or county action was the moving

force behind the injury of which a § 1983 plaintiff complains).

To establish a claim for damages under § 1983 against municipal entities or local government bodies, the plaintiff must prove (1) the entity executed a custom or policy, and (2) that it caused the plaintiff to suffer deprivation of constitutional or other federal rights. *Moss v. Kopp*, 559 F.3d 1155, 1168 (10th Cir. 2009). A municipality cannot be held liable under § 1983 under a respondeat superior theory. *Id.* The court in *Moss* noted that a municipality can be held liable under § 1983 if the final policymaker undertakes the unconstitutional action. *Id.* at 1168-69. In *Moss*, the court upheld the granting of the motion to dismiss where the homeowners failed to identify a decision or policy of the sheriff or county that allowed the search of their home, as required to establish municipal liability in the homeowners' § 1983 lawsuit to recover for the search of the home pursuant to a discovery order in a civil case against the homeowners. *Id.* at 1169.

Therefore, in the present case, even if one or more jailers were deliberately indifferent in this case (which they were not), Sheriff Beggs (and the County) cannot be held liable for their deliberate indifference.

For § 1983 liability to be imposed on Sheriff Beggs in his official capacity, there has to be either the participation of a final policymaker, or an unconstitutional custom or policy of the Sheriff's Office that was the cause of the death. As has been noted,

Sheriff Beggs was not even present at the time that the events in this case occurred. And Sheriff Beggs did not have an unconstitutional policy in effect that caused Crowell's death and there was no showing that there was.

As was noted above, there was no unconstitutional policy of the County in this case. Crowell's inhaler was kept separately from her cell but this was required by Oklahoma Department of Health Jail Standards § 310:670-5-8(2)(A) which prohibited inmates from keeping any medication, except nitroglycerin, in their cells. Sheriff Beggs had no choice but to follow the law, which was seemingly acknowledged by the Court of Civil Appeals in note 22 of its opinion. App. 32-33. *See also Estes v. Conoco Phillips Co.*, 184 P.3d 518, 523 (Okla. 2008) (holding that "[a]dministrative rules are valid expressions of law making powers having the force and effect of law." [Footnote omitted]. The court in *Estes* cited Okla. Stat. tit. 75, § 308.2(C), which provides that the administrative rules shall be valid and binding on the persons they affect and have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. *Id.* at 523 n.18. In its opinion in the present case, at note 2, the Supreme Court of Oklahoma did not question this principle. App. 7.

The Supreme Court of Oklahoma, in its Opinion at 4, ¶ 3, was seemingly critical of the Sheriff's Office in that "a head count was continued after notification of the emergency." App. 4-5. But this head count was

conducted by the jailers on the scene, not by Sheriff Beggs, who was not at the jail when these events occurred. Furthermore, a head count is required by Oklahoma law, see Oklahoma Department of Health Jail Standards § 310:670-5-2(2) & (3) (requiring a prisoner count at the beginning of each shift, and one visual sight check every hour), and is certainly not an unconstitutional policy. Sheriff Beggs was not present during any of the counts, or other events related to this case.

II. OTHER STATE COURTS OF LAST RESORT HAVE FOLLOWED AND APPLIED THE *MONELL* PRINCIPLES; THE DECISION OF THE SUPREME COURT OF OKLAHOMA CONFLICTS WITH THE DECISIONS OF THOSE COURTS.

The decision in the present case, by the Supreme Court of Oklahoma, the court of last resort in Oklahoma state courts, conflicts with numerous other state courts who have complied with the mandates of the United States Supreme Court when a 42 U.S.C. § 1983 action is filed in a state court. *See, e.g., Telfare v. City of Huntsville*, 841 So.2d 1222, 1229 (Ala. 2002) (noting that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents; instead it is when execution of a government's policy or custom inflicts the injury that the government as an entity is responsible under § 1983); *Prentzel v. State, ex rel., Department of Public Safety*, 53 P.3d 587, 596 n.46 (AK 2002) ("Respondeat

superior does not apply in § 1983 actions."); *Richards v. Town of Eliot*, 780 A.2d 281, 294 (Me. 2001) ("Respondeat superior or vicarious liability will not attach under § 1983."); *Williams v. Lee County Sheriff's Department*, 44 So.2d 286, 298 (Miss. 1999) (noting that a governmental entity is only liable under § 1983 only for injuries caused by a municipal policy or custom; a § 1983 plaintiff must show a direct causal link between the municipal action and the deprivation of the civil right); *Schisler v. Beaverhead County*, 143 P.3d 702, 2006 WL 2061147, at *1 (Mont. July 25, 2006) (stating that a § 1983 claim against a governmental entity may not be based upon the theory of respondeat superior); *Stomel v. City of Camden*, 927 A.2d 129, 145 (N.J. 2007) (stating that the official policy requirement of § 1983 was intended to distinguish acts of the municipality from acts of employees of the municipality, and to make clear that municipal liability is limited to actions for which the municipality is actually responsible); *Boyer-Gladden v. Hill*, 224 P.3d 21, 30 (Wyo. 2010) (holding that a sheriff sued in his official capacity under § 1983 was not liable for a deputy's conduct in sexually assaulting a detainee in pretrial detention, because there was no policy or custom of the county or the sheriff that played any role in the deputy's violation of the detainee's rights).

All of these courts have properly interpreted 42 U.S.C. § 1983 liability principles to cases involving counties or municipalities, something that the

Supreme Court of Oklahoma failed to do in this present case.

CONCLUSION

The Court should grant the Petition For a Writ of Certiorari, and reverse the decision of the Supreme Court of Oklahoma.

Respectfully submitted,

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237 P.3d 134

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ESTATE OF EVA JUNE CROWELL, DECEASED, by and through ANNA M. BOEN, Personal Representative, Plaintiff/Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLEVELAND, STATE OF OKLAHOMA, DEWAYNE BEGGS, as Sheriff of Cleveland County, State of Oklahoma; DEPUTY JEANNE ANN BECK; DEPUTY KENNETH ALBRECHT; and CORPORAL MICHAEL STEVENSON, Employees of the Cleveland County Sheriff's Office, Defendants/Appellees,

and

DEPUTY APRIL LYNN CUMMINS and CORPORAL MICHAEL DEAN EASLEY, Defendants.

No. 106,374
For Official Publication

January 26, 2010

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, STATE OF OKLAHOMA

HONORABLE TOM A. LUCAS, TRIAL JUDGE

¶0 Eva June Crowell died following an acute asthma attack that she suffered while incarcerated in the Cleveland County Jail. The personal representative of

her estate brought a civil rights action under 42 U.S.C. § 1983[1] against the Board of County Commissioners of Cleveland County, the Sheriff of Cleveland County, and the sheriff's jail personnel on duty at the time of the attack. The personal representative alleged that Ms. Crowell's death was caused by unnecessary delay on the part of the sheriffs jail personnel in providing an inhaler to her. The defendants sought summary judgment on the ground that the delay in providing the inhaler was not actionable under § 1983, because the delay did not involve deliberate indifference to the serious medical needs of a prisoner. The trial court granted defendants' second

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[1] The Civil Rights Act under which this action was filed provides as follows:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S C. § 1983.

The statute requires an actual connection between the actions of the defendants and the deprivation suffered by the plaintiff. *See Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740,743 (9th Cir.1978).

motion for summary judgment, finding that the record showed no dispute of material fact on the issue of deliberate indifference. The Court of Civil Appeals affirmed. The personal representative timely sought certiorari review by this Court. We hold that the personal representative failed to support a viable claim against the Board of County Commissioners and affirm the summary judgment in favor of the Board. However, the summary judgment record reveals a controversy upon which reasonable minds could differ on the issue of whether the sheriff and jail personnel acted with deliberate indifference in the delay to provide the inhaler. The summary judgment entered in favor of these defendants is reversed and the matter is remanded for trial.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE TRIAL COURT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Albert J. Hoch, Jr. and Jeffrey S. Coe, Oklahoma City, Oklahoma, for Plaintiff/Appellant.

David W. Lee, Lee Law Center, P.C., Oklahoma City, Oklahoma, for Defendants/Appellees.

David J. Batton, Assistant District Attorney, Norman, Oklahoma, for Defendant/Appellee Board of County Commissioners.

REIF, J.

¶1 Eva June Crowell died following an acute asthma attack that she suffered while incarcerated in the Cleveland County Jail. At the time of the attack, jail personnel had possession of Ms. Crowell's inhaler. The personal representative of her estate has alleged that the jail personnel unnecessarily delayed furnishing Ms. Crowell the inhaler after being notified of her emergency need for it. The personal representative contends that this delay caused Ms. Crowell's death and violated her civil rights. Personal representative seeks damages from the Board of County Commissioners of Cleveland County, the Sheriff of Cleveland County and the jail employees on duty at the time of the asthma attack.

¶2 The defendants moved for summary judgment. They contended the delay in providing the inhaler was not actionable under § 1983, because the delay did not involve deliberate indifference to the serious medical needs of a prisoner. Defendants supported this contention with evidentiary materials that showed a jail employee arrived with the inhaler at Ms. Crowell's cell pod around four minutes after the emergency call. At that point, Ms. Crowell had stopped breathing and could not use the inhaler.

¶3 In response, the personal representative presented evidentiary material showing that the decedent's cell mate told jail employees that the decedent was in emergency distress up to twenty minutes or more prior to the time when the jail employee arrived

with the inhaler; that a head count was continued after notification of the emergency; and that by the time a sheriffs employee arrived with the decedent's inhaler, the decedent could not use the inhaler because she was no longer breathing.

¶4 Although finding the personal representative's evidentiary material raised a question of fact as to the negligence of the sheriffs office, the trial court ruled it did not show deliberate indifference or raise a question of fact sufficient to withstand a demurrer to the evidence or motion for directed verdict on the issue of deliberate indifference. The trial court granted summary judgment for defendants. The Court of Civil Appeals agreed that the record showed no dispute of material fact regarding deliberate indifference, and affirmed.

¶5 Upon certiorari, we have considered the evidentiary material in the light most favorable to the personal representative and hold that material questions of fact are in dispute surrounding the length of time and circumstances of the response to the emergency call. Therefore, the issue of whether the sheriff and jail personnel acted with deliberate indifference cannot not be decided – on summary judgment. However, the evidentiary material shows no basis for a claim against the Board of County Commissioners as a matter of law, and we hold that summary judgment was properly granted in favor of the Board.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶6 Eva Crowell was booked into the Cleveland County jail on August 4, 1999. During booking, Ms. Crowell reported that she had asthma and took Albuterol. The sheriff's office initial plan and progress notes indicate that Albuterol was the only medication that had been brought in for Ms. Crowell at the time of her transfer from the Oklahoma City jail. According to the jail medication administration record for August 1999, Ms. Crowell's medical instructions included two puffs on the Albuterol Inhaler four times a day. The record shows that the inhaler was provided four times a day from August 5 through August 19. According to the jail's progress notes, on August 9, 1999, Ms. Crowell complained about "not being able to get her inhaler during the night if she needs it," and that the amount' given to her was not enough. Another notation indicates Ms. Crowell had reported that she usually has some breathing difficulty at night.

¶7 On August 20, 1999, a notation in the medication administration record indicates that the Albuterol instruction was changed to "AS NEEDED." A second notation instructed that the Albuterol Inhaler was to be provided four times a day if needed within a 24 hour period, along with the following admonition: "(DO NOT MAKE HER WAIT – for scheduled med time)." Pursuant to the Oklahoma Department of

Health State Jail Standards,[2] Ms. Crowell was not allowed to keep her inhaler in her cell. The inhaler was stored in a locked cabinet in a medical room, as provided by the Detention Manual.[3] The medical room was located on the second floor of the jail. The

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[2] Standard 310:670-5-8 of the Jail Standards provides:

Adequate medical care shall be provided in a facility. The administrator shall develop and implement written policies and procedures for complete emergency medical and health care services. Policies and procedures shall include at least the following:

. . .

(2)(A) . . . Prescription medications shall be provided to the prisoner as directed by a physician or designated medical authority . . . Neither prescription or over-the-counter medications shall be kept by a prisoner in a cell with the exception of prescribed nitroglycerin tablets.

. . . .

(5) Each facility shall have a plan and provide twenty-four (24) hour emergency medical and dental care.

[3] The Cleveland County Detention Manual provides:

6.01 Medical Services Policy

All Cleveland County Detention Center inmates shall be entitled to health care comparable to that available to citizens in the surrounding community. . . . No Deputy or other employee will ever summarily or arbitrarily deny an inmate's request for medical services.

. . . .

6.06 Medication/Pharmaceutical Policy

3. Storage: All medication, both prescription and non-prescription, and all needles/syringes are stored in the locked cabinet in the medical treatment room.

pod where Ms. Crowell was incarcerated was on the first floor of the jail.

¶8 Ms. Crowell's inhaler had been changed from "scheduled only" medication to "as needed" medication on August 20 because she had been needing the inhaler around 2:30 to 3:00 a.m. for the preceding three or four days. According to reports of interviews conducted by the Oklahoma State Bureau of Investigation,[4] there had been discussions about keeping

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[4] Defendants moved to strike the Representative's proffered OSSI investigative reports on the grounds that they constituted inadmissible hearsay. The reports are signed by the preparing OSSI agent, and are summaries of interviews with jail personnel and inmates. On June 24, 2008, the trial court converted the motion to strike to a motion in limine, and granted it as to the admissibility of the OSSI's Investigative Report at trial as direct evidence. The Court of Civil Appeals, in footnote 5 of its opinion, stated, "The trial court ruled that Representative's proffered OSSI Investigate Report, which contained summaries of interviews with certain Sheriff's Employees and inmates, was inadmissible hearsay." The trial court's ruling, however, pertained to its inadmissibility at trial independently as "direct evidence," and did not address its consideration for purposes of reviewing a summary judgment motion. On summary judgment, under Oklahoma District Court Rule 13, 12 O.S. Supp.2002, ch. 2, app. 1, a procedure is set forth for challenging the admissibility of evidentiary material submitted by another party when that material "does not appear to be convertible to admissible evidence at trial." Rule 13(c). The evidentiary materials attached to a response to a motion for summary judgment are not held to the standard of competent, admissible evidence. *See Julian v. Secured Investment Advisors*, 2003 OK CIV APP 81,1111 17-18,77 P.3d 604,607; *Davis v. Leitner*, 1989 OK 146, 11 13, 782 P.2d 924,926. The evidence compiled in the reports has probative value, controverts defendants' statement of undisputed facts in

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Ms. Crowell's inhaler in the North Control, by the inmate pod, in case she needed it and the medical rover was not on the floor.[5] The North Control had a door which could be opened into the sally port, and a deputy could open the door and give the inhaler to Ms. Crowell as needed. Additional information in the record indicates that from the first day of her incarceration, Ms. Crowell had begged the jail nurse to give her free access to her inhaler in case of emergency.[6] Additional information indicates that she had a history of asthma attacks whereby she needed her inhaler.[7] Other evidentiary material indicates that Ms. Crowell had a similar incident to the asthma attack of August 25, on a previous stay at the jail, and that emergency services had to be called.[8]

¶9 At the time of Ms. Crowell's asthma attack, Deputy Jeanne Beck was working as a north control deputy in the north control booth on the second floor of the jail.[9] Deputy Michael Easley was the shift

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parts, and is convertible to admissible evidence at trial The OSSI reports were sufficient evidentiary materials for consideration on summary judgment.

[5] Oklahoma State Bureau of Investigation Reports, Interview of Deputy Jeanne Anne Beck, page two.

[6] OSSI Reports, Interview of Cheryl McMurray, page two.

[7] OSBI Reports, Interview of Teresa Walker, page two. According to the report, Walker believed it always took too long to get the inhalers to Ms. Crowell.

[8] *Id.* at n.6.

[9] Ms. Crowell was in cell 204 in section A, on the second floor. The detention center has three floors. The inmates are

(Continued on following page)

supervisor, working as a detention corporal in booking. Deputy April Cummins was the med rover on duty at the time of the asthma attack. Deputy Kenneth Albrecht was working as a detention deputy, and Deputy Michael Stevenson was working as a detention corporal in the master control on the first floor.

¶10 The record shows significant discrepancies in the details of the circumstances on the morning of Ms. Crowell's fatal asthma attack on August 25, 1999. Deputy Beck stated that she received a call for Ms. Crowell's inhaler at 2:38 a.m., and that she noted the time on her log. Deputy Beck said she called the medical rover, Deputy Cummins, who was on the first floor conducting a head count. According to Deputy Beck, Deputy Cummins told Deputy Beck she would be there "in a minute." Deputy Beck related she knew Deputy Cummins was aware of Ms. Crowell's asthma problem. Deputy Beck stated that at 2:40 a.m., she heard Ms. Crowell's cell mate, Judith Hall, say that Ms. Crowell was turning blue. At 2:41 a.m., Deputy Beck said that she radioed her colleagues, "guys, get up here novy." Deputy Beck stated that a few seconds after the call, Corporal Michael Easley and Deputy April Cummins arrived at the gate to the day room

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housed on the second floor, which is divided into a south side with sections A & B, and a north side with two sections C & D. The booking area is on the first floor. Inmate medications are kept in a locked medicine cabinet located in a medical room on the second floor, next to the nurse's office. From the north control booth, access to all the inmate area doors and gates on the second floor are opened, closed, locked, and unlocked.

where Ms. Crowell was lying on the floor. Deputy Beck said she had no medical training, and knew nothing about asthma. Deputy Beck let Inmate Mia Adams out of her cell to assist since Adams was a nurse. Deputy Beck further stated that the emergency crew arrived at 2:44 a.m.

¶11 Corporal Stevenson stated that the first call for the inhaler was at 2:38, and that on the video monitors, he saw Corporal Easley arrive and begin CPR before the emergency crew arrived at 2:44 a.m. Deputy Albrecht stated that he was assigned to do head count in section C. Deputy Albrecht knew Ms. Crowell had asthma and that her inhaler was on an "as needed" basis. He heard the first report of an emergency on his radio at 2:41 a.m., and the second call about 15 seconds later, when he started toward section A on a run. He stated he arrived in the day room at the same time as Corporal Easley. He observed an inmate performing CPR on Ms. Crowell when he arrived, and at the same time, Deputy Cummins arrived with an inhaler. Deputy Albrecht noticed that Ms. Crowell appeared "purplish and gray" and that her eyes were rolled back. He stated that he and Corporal Easley checked Ms. Crowell's pulse, and she was not breathing. He then went downstairs and escorted the emergency crew to Ms. Crowell at 2:44 a.m.

¶12 Deputy Cummins stated that at 2:38 a.m., she was in the area where inmates are booked, and clearing head count. She was the med rover and responsible for passing out medication to inmates as

needed, and also to rove around the jail doing whatever needed to be done at the time. At that time, Deputy Beck received a call from Judy Hall, the cell mate of Ms. Crowell, stating that Ms. Crowell needed her inhaler. She said Ms. Crowell utilized the inhaler "quite a lot." She told Deputy Beck it would be a minute or so before she got the inhaler, as she was clearing head count, and it was not portrayed as a life or death situation. A minute and a half later, she was en route to the med room when a second call came saying Ms. Crowell needed the inhaler right away. Deputy Cummins told Deputy Beck she was on her way to the second floor. When she got to the second floor, a third call came from Deputy Beck saying, "everyone get up here now – she's turning blue." She thought the log showing the third request made at 2:41 a.m. may not be accurate. She got the inhaler and she and Corporal Easley entered the pod together, and inmate Hall was pumping Ms. Crowell's chest.

¶13 According to the OSBI report, Corporal Easley stated at that 2:38, he was booking in a prisoner when the call came for the inhaler. He heard Deputy Cummins say she would get the inhaler, and when the second call came, Deputy Cummins dropped what she was doing and went to get the inhaler. When the third call came, he went to the sally port. In his deposition, Corporal Easley stated that at the time of the first call, "my med rover, Deputy Cummins, was booking someone in. We had two booking windows." He said Deputy Cummins "continued to finish booking her – the person she was working on because it's

very hard to switch that out and have another deputy step in and do it because there's a whole set of procedures you have to do to get someone booked in." This account varies from Deputy Beck's statement that Deputy Cummins was conducting a head count, and Deputy Cummins' statement that she was clearing head count. He stated that "a few minutes later," a second request was made for the inhaler, at which time Deputy Cummins went upstairs to the med room. He also stated that Ms. Crowell requested the inhaler a lot, and in the middle of the night.

¶14 According to the OSBI reports of the inmate interviews, Ms. Crowell's cell mate, Judith Hall, stated that between 2:00 and 2:30, Ms. Crowell called her and said she needed her inhaler. Hall pushed the intercom button several times before anyone responded. Ms. Crowell was in distress so Hall pulled her off the top bunk by her shirt and blanket. Hall pushed the intercom again and said "she's really needing this inhaler now – let's go." Hall asked for the door to be opened to get her in the day room, and a minute or so later, they told her to have Ms. Crowell meet them at the sally port. Hall wrapped a blanket around Ms. Crowell and pulled her towards a table in the day room. Ms. Crowell said she was dying and her lips were blue, and she collapsed on the floor.

¶15 In estimating the time interval between Ms. Crowell sitting up in bed in distress and reaching the table in the day room, Hall said probably 10 to 12 minutes had gone by. Hall relayed by intercom the information that Ms. Crowell's eyes had rolled back in

her head and she had stopped breathing. She did not know if there was a response, because she immediately went back to Ms. Crowell to try to get air into her. Another inmate did chest compressions. Three or four minutes after the inmates started the CPR, the sally port door opened and Deputies Albrecht, Cummins, and McDaniels arrived. They told the inmates to get back in their cells and released the inmate nurse, who checked Ms. Crowell's pulse and gave a negative look indicating it was too late. Hall stated that Ms. Crowell never regained consciousness, and that none of the deputies ever attempted CPR.

¶16 Teresa Walker stated that she heard hollering at 2:38, looked out her cell window, and saw Ms. Crowell on her back on the day room floor. Her cell mate was with Ms. Crowell, and started to do chest compressions. She pushed the intercom button, but no one answered, and another inmate waved and flailed her arms in front of security cameras to no avail. Walker stated that approximately 12 to 20 minutes went by before any deputies arrived. Another inmate, Michele Adams, stated that two inmates performed CPR on Ms. Crowell for at least 5 to 7 minutes. She stated that Deputy Cummins arrived and got Rebecca Dean, an LPN, out of her cell and Dean took charge of the CPR. Inmate Boyd stated that at 2:30 she heard screaming and saw Ms. Crowell on her back, and Hall pumping on Ms. Crowell's chest. She stated that "[i]t seemed like 15 minutes before any jailer came to the scene," and that when Deputy Cummins arrived, so did the emergency crew.

Another inmate, Cheryl McMurray, estimated that it took at least 15 to 20 minutes before a response from the jailers. According to other OSBI interviews, two members of the fire department stated that they responded to the call regarding a female inmate in medical distress at approximately 2:30 a.m.

¶17 On March 22,2005, Anna M. Boen, Personal Representative of the Estate of Eva June Crowell, decedent, filed an action against Dewayne Beggs, as Sheriff of Cleveland County, five employees of the sheriffs office,[10] and the Board of County Commissioners of Cleveland County, arising from a delay in responding to Ms. Crowell's acute asthma attack on August 25, 1999, while Ms. Crowell was incarcerated in the Cleveland County jail. Ms. Crowell went into respiratory arrest before the inhaler arrived, was transported to a hospital, and died thirteen days after her attack. The personal representative asserted that Ms. Crowell's death was caused by the unreasonable delay of the sheriffs' employees in responding to the emergency call for Ms. Crowell's inhaler. In her petition, the personal representative asserted various theories of liability, including gross negligence and reckless disregard of Ms. Crowell's welfare for failure to provide proper medical care and medication. The personal representative also asserted violations of Ms. Crowell's constitutional rights under the Eighth

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[10] The employees and officers were Corporal Michael Easley, Corporal Michael Stevenson, Deputy Jeanne Beck, Deputy April Cummins, and Deputy Kenneth Albrecht.

Amendment for cruel and unusual punishment, and civil rights under 42 U.S.C. § 1983, for refusal to provide the medical care that would have saved decedent's life, while employees knew of her serious medical condition and deteriorating status. The personal representative also alleged violations based on failure to properly train and supervise personnel; failure to provide proper medical care and medication; and failure to adopt appropriate procedures for dealing with emergencies.

¶18 The defendants Board of County Commissioners, Sheriff Beggs, and sheriff's employees Albrecht, Beck, and Stevenson, filed a motion for summary judgment on February 9,2007.[11] On May 17, 2007, the court denied summary judgment with respect to the Board of County Commissioners, and with respect to the individual defendants Beggs, Albrecht, Beck, and Stevenson in their official capacities. The court granted the motion for summary judgment with respect to the individual defendants Beggs, Albrecht, Beck, and Stevenson in their individual capacities.[12]

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[11] The docket sheet indicates that Sheriff Beggs, in his official capacity, and the Commissioners had previously filed a motion to dismiss on August 5, 2005. The docket sheet shows that the Commissioner's motion to dismiss federal § 1983 claims was denied on September 13, 2005. The docket sheet does not indicate a ruling on the Sheriff's motion.

[12] The docket sheet shows that on May 17, 2007, judgments were entered for all of the defendants on the issue of negligence, including Cummins and Easley.

¶19 On March 7, 2008, the defendant Commissioners, Sheriff Beggs, and sheriffs employees Albrecht, Beck and Stevenson filed a second motion for summary judgment. Defendants asserted that the second motion was proper because after presentation of the first motion, the personal representative's expert stated in deposition that a four minute response time was "not bad." Defendants further asserted that the Board of County Commissioners was not a proper party to the § 1983 lawsuit; that none of the employees were deliberately indifferent to Ms. Crowell's alleged serious medical needs, and that no action of the employees, lack of training, or custom or policy of the sheriffs office, caused Ms. Crowell's death.

¶20 The trial court denied the second motion for summary judgment on June 6,2008, but allowed for the decision to be reconsidered at pretrial. At pretrial, the court found that the evidentiary materials submitted by the personal representative supported only a finding of negligence and not of deliberate indifference. The court granted summary judgment on defendants' motion.[13]

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[13] For purposes of 12 O.S. 2001 § 994, this order disposed of all the claims and all the parties because the docket sheet shows that Easley and Cummins were never served with summons, that an attorney never entered an appearance on their behalf, and that they never answered the petition.

Commissioners of Cleveland County was proper as a matter of law.

¶24 Personal representative bases her claim against the Cleveland County Sheriff and jail personnel upon a violation of the Eighth Amendment. This Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment prohibited by the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 3121 (1986); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976).

¶25 The United States Supreme Court has recognized that "deliberate indifference to serious medical needs of prisoners" may constitute cruel and unusual punishment under the Eighth Amendment. *Estelle*, 429 U.S. at 104; *Farmer v. Brennan*, 511 U.S. 825 (1994). The Eighth Amendment therefore applies to prison officials when they provide medical care to inmates. *See Estelle*, 429 U.S. at 103.

¶26 Where a prisoner's Eighth Amendment claims have arisen in the context of the provision of medical care, the prisoner must show "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106. An Eighth Amendment medical claim has two elements, "[1] the seriousness of the prisoner's medical need and [2] the nature of the defendant's response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other

grounds, *WMX Techs., Inc. v. Miller*, 104 F .3d 1133 (9th Cir. 1997); *see Hathaway v. Coughlin*, 37 F .3d 63, 66 (2d Cir. 1994) (citations omitted). The prisoner must show (1) objectively that he suffered a sufficiently serious deprivation and (2) subjectively that prison officials acted with deliberate indifference in allowing or causing the deprivation to occur. *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991).

¶27 With respect to the first element, where a prisoner establishes the existence of a serious medical need, a prisoner satisfies the objective requirement for proving an Eighth Amendment violation. *Farmer*, 511 U.S. at 834. A medical need is considered serious "if the failure to treat the prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" "*McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). The standard for an Eighth Amendment violation contemplates "a condition of urgency" that may result in "degeneration" or "extreme pain." *Chance v. Armstrong*, 143 F.3d 698,702 (2d Cir. 1998) (quoting *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994), cert. den., 513 U.S. 1154 (1995)); *see also Harrison v, Barkley*, 219 F.3d 132, 136-37 (2d Cir. 2000) ("A serious medical condition exists where 'the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.'") (quoting *Chance*, 143 F.3d at 702).

¶28 Relevant factors for determining whether a serious medical need exists include "[t]he existence of

an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Chance*, 143 F.3d at 702 (quoting *McGuckin v. Smith*, 974 F.2d at 1059-60 (9th Cir. 1992), overruled on other grounds, *WMX Tech., Inc. v. Miller*, 104 F .3d 1133 (9th Cir. 1997).

¶29 In the case at hand, "the responsibility for medical care of persons incarcerated in the Cleveland County Detention Center . . . [is placed] squarely on the sheriff."[17] "The sheriff makes the policies and provides the supervision."[18] The sheriff of each county in Oklahoma has a statutory duty to provide "medical care when required, and all necessities for the comfort and welfare of prisoners." 57 O.S. 2001 § 52. This duty underlies the sheriff's liability as the supervisory authority.

¶30 "A supervisor is not liable under section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise.'" *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988) (quoting *Specht v. Jensen*, 832 F.2d 1516,1524 (10th Cir. 1987) (reh'g en banc granted on other grounds, and judgment, but not opinion, vacated.) However, a plaintiff may meet this

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[17] *Id.* at n.14

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burden by showing, that the "supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation." *Id.* (citations omitted).

¶31 In Oklahoma, as previously stated, a sheriff has a statutory duty to provide medical care to prisoners and is responsible for the proper management of the jail and the proper conduct of the jail personnel. "As a result, 'a sheriff is accountable in a § 1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm.'" *Id.* (quoting *Anthony v. Baker*, 767 F.2d 657,666 (10th Cir. 1985)). Where liability is based on what the defendants knew or should have known, "self-imposed ignorance" on the part of the defendants is not determinative, and a plaintiff may show the matters that the defendants knew or should have known by circumstantial evidence and inference. *Copeland*, 1999 OK 81 at ¶¶ 8 and 10, 996 P.2d at 933-34.

¶32 Depending on its degree, asthma can be a serious medical condition. *Garvin v. Armstrong*, 236 F.3d 896 (7th Cir. 2001). With respect to the first element of § 1983 claim against the Sheriff and jail personnel, a reasonable fact finder could conclude from the evidence that Ms. Crowell's asthma constituted an objective, serious medical condition. Viewing the evidence in the light most favorable to the personal representative, the degree of Ms. Crowell's asthma was severe. Ms. Crowell frequently had urgent need for the inhaler, to the point that a

an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Chance*, 143 F.3d at 702 (quoting *McGuckin v. Smith*, 974 F.2d at 1059-60 (9th Cir. 1992), overruled on other grounds, *WMX Techs., Inc. v. Miller*, 104 F .3d 1133 (9th Cir. 1997).

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¶31 In Oklahoma, as previously stated, a sheriff has a statutory duty to provide medical care to prisoners and is responsible for the proper management of the jail and the proper conduct of the jail personnel. "As a result, 'a sheriff is accountable in a § 1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm.'" *Id.* (quoting *Anthony v. Baker*, 767 F.2d 657,666 (10th Cir. 1985)). Where liability is based on what the defendants knew or should have known, "self-imposed ignorance" on the part of the defendants is not determinative, and a plaintiff may show the matters that the defendants knew or should have known by circumstantial evidence and inference. *Copeland*, 1999 OK 81 at ¶¶ 8 and 10, 996 P.2d at 933-34.

¶32 Depending on its degree, asthma can be a serious medical condition. *Garvin v. Armstrong*, 236 F.3d 896 (7th Cir. 2001). With respect to the first element of § 1983 claim against the Sheriff and jail personnel, a reasonable fact finder could conclude from the evidence that Ms. Crowell's asthma constituted an objective, serious medical condition. Viewing the evidence in the light most favorable to the personal representative, the degree of Ms. Crowell's asthma was severe. Ms. Crowell frequently had urgent need for the inhaler, to the point that a

discussion had taken place regarding placement of the inhaler close to her cell. Her dosage had been increased to as needed, and she had been calling for the inhaler during the night. The jail personnel recognized the severity of her condition as evidenced by the notation to not make her wait for the inhaler. The personal representative's evidentiary material was sufficient to create a question of fact regarding a serious medical condition.

¶33 Once a party has established the existence of a prisoner's serious medical need, the party must then show that prison officials responded to the serious medical need with deliberate indifference. *Farmer*, 511 U.S. at 834. Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. *Id.* at 835. Before it can be established that a prisoner's civil rights have been abridged regarding medical care, "the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton v. Cutter Laboratories*, 622 F .2d 458, 460 (9th Cir.1980) (citing *Estelle*, 429 U.S. at 105-06); *see also Toguchi v. Soon Hwang Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) ("Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights."); *McGuckin*, 974 F.2d at 1059. Deliberate indifference is "a state of mind more blameworthy than negligence" and "requires 'more than ordinary lack of due

care for the prisoner's interests or safety.'" *Farmer*, 511 U.S. at 834 (quoting *Whitley*, 475 U.S. at 319).

¶34 In general, deliberate indifference may be shown when prison officials deny, delay, or intentionally interfere with medical treatment. Deliberate indifference may also be shown by the way in which prison officials provide medical care. *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir. 1988). An official acts with the requisite deliberate indifference when that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

¶35 Delays in providing medical care may manifest deliberate indifference. *Estelle*, 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay in providing care, a plaintiff must show that the delay was harmful. *See Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994); *McGuckin*, 974 F.2d at 1059; *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990); *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989); *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). In this regard, "[a] prisoner need not show his harm was substantial; however, such would provide additional support for the inmate's claim that the defendant was deliberately indifferent to his needs." *Jeff v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see also McGuckin*, 974 F.2d at 1060.

¶36 In the present case, the duration of the delay, and the circumstances surrounding the delay, are sharply disputed. The personal representative submitted evidentiary material indicating that jail personnel were aware that urgency was essential when Ms. Crowell needed her inhaler, that jail personnel did not respond promptly when the call was made for the inhaler, and that the delay in bringing the inhaler to Ms. Crowell was as long as twenty minutes. The personal representative's evidentiary material also indicated that jail personnel recognized that placement of the inhaler in locked storage delayed the response time for bringing the inhaler to Ms. Crowell, and a proposal to keep the inhaler in closer proximity had been discussed but not implemented. The medical evidence showed that Ms. Crowell died from an acute asthma attack.

¶37 Under these circumstances, a reasonable fact finder could conclude that the jail personnel and Sheriff acted with deliberate indifference to Ms. Crowell's serious medical needs. We conclude that there were genuine issues of material fact with respect to deliberate indifference arising from the delay in providing medical care to Ms. Crowell. Accordingly, the summary judgment in favor of defendants Beggs, as sheriff, and Albrecht, Beck, and Stevenson, in their official capacities, is reversed and the cause is remanded for trial.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE TRIAL COURT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

¶38 EDMONDSON, C.J., HARGRAVE, OPALA, KAUGER, WATT, COLBERT, and REIF, JJ., concur.

¶39 TAYLOR, V.C.J., with whom WINCHESTER, J., joins, dissenting. The Court of Civil Appeals was correct. I would affirm the trial court on the issue of "deliberate indifference" and all other issues.

NOT FOR OFFICIAL PUBLICATION
IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA
COURT OF CIVIL APPEALS
DIVISION III STATE OF OKLAHOMA
ESTATE OF EVA JUNE CROWELL,
DECEASED, by and through ANNA
M. BOWEN, Personal Representative,
Plaintiff/Appellant,
v.
BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF CLEVELAND, STATE OF
OKLAHOMA; DEWAYNE BEGGS, as Sheriff of
Cleveland County, State of Oklahoma; DEPUTY
JEANNE ANN BECK; DEPUTY KENNETH
ALBRECHT; and CORPORAL MICHAEL
STEVENSON, Employees of the Cleveland
County Sheriff's Office,
Defendants/Appellees,
and
DEPUTY APRIL LYNN CUMMINS and
CORPORAL MICHAEL DEAN EASLEY,
Defendants.

No. 106,374

December 18, 2008

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA
HONORABLE TOM A. LUCAS, JUDGE

AFFIRMED

Jeffrey S. Coe,
Albert J. Hoch, Jr.,
HOCH & ASSOCIATES,
Oklahoma City, Oklahoma, For Plaintiff/Appellant,

David W. Lee,
LEE LAW CENTER, P.C.,
Oklahoma City, Oklahoma,
and
David J. Batton,
ASSISTANT DISTRICT ATTORNEY,
Norman, Oklahoma, For Defendants/Appellees.

Opinion by Kenneth L. Buettner, Presiding Judge:

¶1 Plaintiff/Appellant Anna M. Boen, Personal Representative of the Estate of Eva June Crowell, Deceased, (Representative) filed her Petition alleging claims for negligence, deliberate indifference, and civil rights violations against Defendants/Appellees the Cleveland County Board of Commissioners (Commissioners), Cleveland County Sheriff Dewayne Beggs (Sheriff), Deputies Jean Ann Beck and Kenneth Albrecht, and Corporal Michael Stevenson ("Sheriff's Employees") (collectively, Appellees). Representative alleged Decedent's death was caused by Sheriff's Employees' delay in responding when Decedent suffered an asthma attack while she was in custody at the Cleveland County Jail. The case proceeded on Representative's federal civil rights claims. After reconsideration, the trial court granted Appellees' Second Motion for Summary Judgment, from which Representative appeals. We agree with the

trial court's finding that while the record may include evidence of negligence, the record does not show a dispute of fact on the essential element of deliberate indifference. We therefore affirm summary judgment.

¶2 While she was incarcerated in the Cleveland County Jail, Decedent experienced an asthma attack around 2:30 a.m. on August 25, 1999. Sheriff's Employees responded to calls for help. Emergency medical workers transported Decedent to Norman Regional Hospital where she died 13 days later. The medical examiner's report shows the cause of death was an acute asthma attack.

¶3 Representative filed her Petition March 22, 2005.[19] Representative made claims for reckless and willful failure to monitor Decedent's health, provide medical care, provide medication, and seek medical treatment. Representative also claimed Appellees violated Decedent's 8th Amendment right against cruel and unusual punishment and her civil rights protected by 42 U.S.C. § 1983. Lastly, Representative sought an award of punitive damages. The record indicates the case proceeded only on Representative's federal claims.[20]

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[19] Nothing in the record indicates the statute of limitations was presented as a defense.

[20] Defendants Stevenson and Beggs, individually, filed their Answer August 5,2005. The docket sheet shows that Beggs and Commissioners filed a motion to dismiss the same day. The docket sheet shows that the motion to dismiss the § 1983 claims was denied September 13, 2005. Commissioners, Beggs, Beck,

(Continued on following page)

¶4 Appellees filed their Motion for Summary Judgment February 9, 2007. They asserted the Sheriff is an elected official and that Commissioners were not liable because they had no control over the Sheriff or his employees. They further asserted that Sheriff Beggs had no personal involvement in the incident, which they argued was a required element for § 1983

Stevenson, and Albrecht filed answers after that date. Of these pleadings, only the Answer of Defendants Stevenson and Beggs, individually, has been designated for the record. In their Answer, Stevenson and Beggs asserted they were exempt from liability under the Oklahoma Governmental Tort Claims Act, and that Representative failed to comply with the GTCA. They further asserted their actions were necessary under the circumstances and denied Representative's claims that they proximately caused Decedent's injury and death.

The GTCA provides:

The state or a political subdivision shall not be liable if a loss or claim results from:

* * *

24. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections; . . . .

51 O.S. 2001 § 155. That section applies to claims based on the provision of medical services. *Hutto v. Davis*, 972 F.Supp. 1372 (W.D. Okla.1997); *Medina v. State*, 1993 OK 121, 871 P.2d 1379.

The docket sheet does not indicate that Defendants Michael Dean Easley and April Lynn Cummins answered the Petition.

liability.[21] Appellees next argued that a § 1983 claim requires proof of "deliberate indifference" to the prisoner's serious medical needs, and they asserted there was no evidence that Sheriff's Employees acted with deliberate indifference in responding to Decedent's asthma attack.

¶5 The trial court entered a Journal Entry May 17, 2007, in which it denied the Motion for Summary Judgment with respect to Commissioners and Sheriff, Albrecht, Beck, and Stevenson in their official capacities. In the same order the court granted Summary Judgment to Sheriff, Albrecht, Beck and Stevenson in their individual capacities.

¶6 Appellees filed their Second Motion for Summary Judgment March 7, 2008. Appellees included a list of thirteen undisputed facts.[22] The trial court denied the

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[21] For a supervisor to be liable for a § 1983 claim, the plaintiff must show an "affirmative link" between the supervisor defendant and the alleged constitutional deprivation. *Green v. Branscom*, 108 F.3d 1296, 1302 (10th Cir. 1997).

[22] Appellees asserted there was no issue of fact that 1) Sheriff is the policy maker for the Cleveland County Sheriff's Office and the county jail; 2) Commissioners have no control over Sheriff's operations, including the hiring and training of his employees, and Commissioners have no authority to issue regulations governing Sheriff or his office; 3) the Oklahoma Department of Health's Jail Standards require jail employees having direct contact with inmates to have at least 24 hours of training in security, first aid, and CPR within one year of being hired; 4) Sheriff required all jail employees to receive 40 hours of training within the first year, of which 8 hours were devoted to first aid and CPR; 5) Sheriff's Employees received the training

(Continued on following page)

Second Motion for Summary Judgment in a Journal Entry filed June 24, 2008. However, Appellees asked the court to reconsider its decision, and in a Journal Entry filed September 5, 2008, the trial court granted the Second Motion for Summary Judgment. The trial

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required by Sheriff within their first year of employment; 6) the Oklahoma Department of Health's Jail Standards prohibit inmates from keeping medication in their jail cells; 7) Sheriff's Employees complied with those Standards by not allowing Decedent to keep her asthma inhaler in her cell, and instead keeping the inhaler in a medication cabinet in the medical room on the same floor of the jail as Decedent's cell; 8) on August 25, 1999, the first request for Decedent's inhaler was made at approximately 2:38 a.m. and it was delivered to her at approximately 2:42 a.m.; 9) the four minute delay in getting the inhaler to Decedent did not cause her death; 10) Representative's expert witness Dr. Imes agreed a four minute response time is not bad; 11) Decedent would have collapsed and died even if she had the Albuterol inhaler with her at the time of the attack and was able to use it; 12) on August 25, 1999, no employee of Sheriff's office was deliberately indifferent to Decedent's serious medical needs; 13) Decedent received her medications as prescribed while incarcerated at the jail, and she had received the Albuterol inhaler at 11:00 p.m. August 24, 1999, which was just over three hours before the final attack.

Representative did not submit admissible evidence showing a dispute to these facts until her Plaintiff's Response to Defendant's (sic) Reply to Plaintiff's Response to Defendants' Second Motion and Brief for Summary Judgment. In that pleading, Representative attached affidavits of two inmates purporting to create a question of fact on the length of time it took Sheriff's Employees to respond to calls for help during Decedent's asthma attack. Representative also attached the deposition transcript of Dr. Imes, who testified that if Decedent had her inhaler with her in her cell at the time of her attack she likely would have survived.

court found that Representative's "proffered evidence raises a question of fact as to the negligence of (Sheriff's) Office, but (Representative's) proffered evidence does not show 'deliberate indifference' or raise a question of fact sufficient to withstand a demurrer to the evidence/motion for directed verdict on the issue of deliberate indifference." The court found that its ruling disposed of all claims in the case. Representative appeals.

¶7 Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S. 2001, Ch. 2, App. I. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. *Brown v. Alliance Real Estate Group*, 1999 OK 7, 976 P.2d 1043, 1045. Summary judgment is not proper where reasonable minds could draw different inferences or conclusions from the undisputed facts. *Id.* Further, we must review the evidence in the light most favorable to the party opposing summary judgment. *Vance v. Fed. Natl. Mortg. Assn.*, 1999 OK 73, 988 P.2d 1275.

¶8 As noted above, only Representative's civil rights claim remained at the time the summary judgment motions were decided. To state a claim under 42 U.S.C.A. § 1983 for violation of civil rights based on denial of medical treatment, a party must show "deliberate indifference" to the inmate's serious medical need. Simple negligence is not sufficient. A § 1983 claim is based on the Fourteenth Amendment, but it may be analyzed under the Eighth Amendment's

"deliberate indifference" standard of proof. *Weiss v. Cooley*, 230 F.3d 1027 (7th Cir.2000). Mere negligence and ordinary errors of judgment do not support a prisoner's Eighth Amendment claim. *Medina v. State*, 1993 OK 121, 871 P.2d 1379. Wanton conduct and deliberate indifference to serious medical needs by prison officers or employees triggers the Cruel and Unusual Punishment Clause of Eighth Amendment. *Id.* 871 P.2d at 1385. To succeed on an Eighth Amendment claim, as opposed to a medical malpractice claim under state tort law, a plaintiff is required to identify acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Callahan v. Poppell*, 471 F.3d 1155 (10th Cir. 2006).

¶9 In this case, taking the admissible evidence in the light most favorable to Representative shows that Sheriff's Employees arrived to help Decedent between four and twenty minutes after the first call for help.[23] Cummins was the "med rover" on duty and she

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[23] In his affidavit, Stevenson averred that the first call for Decedent's inhaler came at 2:38 a.m., and at 2:40 a.m. he heard Beck advise Cummins that Decedent's cell mate Hall stated that Decedent was turning blue. On the video monitors, Stevenson saw Easley arrive at Decedent's side and begin CPR before the EMT crew arrived at 2:44 a.m.

In her affidavit, Beck averred that she received a call for Decedent's inhaler at 2:38 a.m. Beck heard Hall say that Decedent was turning blue at 2:40 a.m. At 2:41 a.m., Beck stated over the radio to her colleagues, "guys, get up here now." A few seconds after that, Easley and Cummins arrived at the gate to the dayroom where Decedent was lying on the floor. Beck also averred the EMT crew arrived at 2:44 a.m.

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went to the medication room to get Decedent's inhaler. Decedent had a prescription Serevent inhaler which was to be used at regular intervals and a

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Albrecht averred in his affidavit that he first heard on his radio a report of an emergency at 2:41 a.m. He walked from the C section of the jail to the A section and arrived at the same time as Easley. In the Section A dayroom he observed one inmate performing CPR on Decedent. At the same time, Cummins arrived with an inhaler. Albrecht noticed Decedent appeared "purplish and gray" and her eyes were rolled back. Albrecht and Easley checked her pulse which was weak, and she was not breathing. Albrecht went downstairs and escorted the EMTs to Decedent at 2:44 a.m.

Inmate Cheryl McMurray averred in her affidavit that at approximately 3 :00 a.m. she was awakened by screaming and saw Decedent go out of her cell and collapse in the dayroom. McMurray pressed the intercom repeatedly to get the employees' attention. McMurray averred that "(n)o jail employee arrived for at least 15 to 20 minutes after (Decedent's) collapse."

Judith Hall was Decedent's cell-mate. In her affidavit, she averred that between 2:30 and 3:00 a.m., Decedent sat up in bed and asked Hall for help. Hall pressed the intercom button several times. Sheriff's Employees responded a minute and a half later and Hall told them Decedent needed her inhaler. The employee responded "we're on our way." Hall helped Decedent out of the cell and into the dayroom where Decedent collapsed. Hall averred that "(m)ore than five minutes, and probably ten to twelve minutes, passed between the time (Decedent) first sat up in bed until she reached the table in the dayroom" where she collapsed. Hall averred that when Decedent collapsed, her eyes rolled back and she stopped breathing. The inmates began CPR and "three to four minutes" later jail employees arrived and Decedent was completely unconscious.

The trial court ruled that Representative's proffered OSBI Investigative Report, which contained summaries of interviews with certain Sheriff's Employees and inmates, was inadmissible hearsay.

prescription Albuterol inhaler for use as needed. The record shows a dispute about whether Cummins brought the proper inhaler, but the undisputed evidence shows that when Cummins reached Decedent with the inhaler, Decedent had collapsed and was not breathing sufficiently to use the inhaler. The record shows either Sheriff's Employees or other inmates performed CPR on Decedent until emergency medical technicians arrived a few minutes later.

¶10 The evidence showed that when Cummins first received the call for the inhaler, she answered "in a minute." Representative's medical expert testified that if Decedent had used the proper inhaler early enough in the attack she probably would have survived. Dr. Norman Imes testified his "opinion is that had she received a – a dose of her Albuterol inhaler – while she was still breathing, obviously – she would have had an improvement, which would have at least given her time to get to the ER or perhaps even terminate the (asthma attack)."

¶11 Decedent never used the inhaler Cummins brought because she was unable to breathe. We agree with the trial court that this evidence presents a question of fact on negligence. But the standard of proof required here is higher than simple negligence. Deliberate indifference is shown, for example, where the prison employee "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Deliberate indifference may be shown in a delay in treatment where a medical

professional fails or delays referral of a case to a person capable of treating the ailment; a medical professional fails to treat an ailment so obvious that a layman would recognize the condition; or a medical professional completely denies care when presented with recognizable symptoms of a medical emergency. *Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006). In this case, Sheriff's Employees recognized the emergency and responded with Decedent's prescription medication within minutes of the call for help. Because Decedent was unable to breathe, Sheriff's Employees began CPR until EMTs arrived and took over caring for Decedent. In *Pietrafeso v. Lawrence County, South Dakota*, 452 F.3d 978 (7th Cir. 2006), the Seventh Circuit Court of Appeals affirmed summary judgment on the issue of deliberate indifference where the jail employee arrived at the cell with a nebulizer but no mouthpiece and when he returned with a mouthpiece for the nebulizer, the inmate was in asthmatic arrest, the jailers did not know how to mix the prescribed solution but the inmate found leftover solution in the nebulizer, the jailers called an ambulance and the inmate died of an asthma attack less than an hour later. As the court explained, "(d)uring the frantic minutes . . . when (inmate) suffered the fatal attack, (jailer) could be faulted for bringing a nebulizer without a mouthpiece, for not knowing how to prepare the nebulizer solution, and for allowing (inmate) to inhale a prior user's solution. But (jailer) was trying to treat the attack, not ignore it. This may be evidence of negligence, but it was not deliberate indifference." *Id.* at 983-984. Those facts

are similar to the undisputed facts here. Sheriff's Employees attended Decedent within minutes and the medical rover Cummins brought Decedent's inhaler which Decedent was unable to use because she was unable to breathe. We do not find the record presents a dispute of material fact on the essential element of deliberate indifference in Sheriff's Employees' response to Decedent's serious medical need.

¶12 Representative also challenges the fact that Sheriff's Employees did not allow Decedent to keep her inhaler with her in her cell. In response to the question whether, if Decedent had the inhaler in her cell at the onset of the attack and had been able to use it effectively and timely, she would not have died, Dr. Imes testified "(t)he likelihood is that she would not have died." Appellees cited an Oklahoma Department of Health Jail Standard (§ 310:670-5-8(2)(A)) which prohibited inmates from keeping any medication, except nitroglycerin, in their cells. Accordingly, Sheriff's Employees were following a State regulation by not allowing Decedent to keep the inhaler in her cell. And, the evidence indicated Decedent had called for her inhaler on other occasions and had successfully used it. The undisputed facts that keeping the medication in a separate room was State policy and that such system normally was successful shows no deliberate indifference to Decedent's serious medical needs.

¶13 Because the record shows no dispute of the material fact of deliberate indifference, we do not reach Appellees' claims that Sheriff's Employees had

qualified immunity[24] and that Commissioners had no control over, and therefore no liability, for conduct of Sheriff or his employees.

AFFIRMED.

MITCHELL, V.C.J., and BELL, J., concur.

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[24] The threshold inquiry in a qualified immunity case is whether, taking the evidence in the light most favorable to the plaintiff, the state official violated a constitutional right. *Williams v. Berney*, 519 F.3d 1216, 1220 (10th Cir. 2008). The constitutional claim here requires a showing of deliberate indifference. Because we have found no constitutional violation as a matter of law, the qualified immunity inquiry ends. *Id.*

IN THE DISTRICT COURT
OF CLEVELAND COUNTY
STATE OF OKLAHOMA
ESTATE OF EVA JUNE CROWELL,
DECEASED, by and through
ANNA M. BOEN, Personal Representative,
Plaintiff,
vs.
BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF CLEVELAND,
STATE OF OKLAHOMA, et al.,
Defendants.

Case No. CJ-2005-484

September 5, 2008

JOURNAL ENTRY

LUCAS, Tom A., Cleveland County District Judge

On August 28, 2008, the Court reconsidered Defendants' Second Motion and Brief for Summary Judgment and Plaintiff's Supplemental Response/ Objection to Defendants' Second Motion and Brief for Summary Judgment. After hearing argument from counsel, the Court issued the following ruling:

Upon construing the matters raised most favorably to Plaintiff, the Court finds that Plaintiff's proffered evidence raises a question of fact as to the negligence of the Cleveland County Sheriff's Office, but Plaintiff's proffered evidence does not show "deliberate indifference" or raise a question of fact sufficient to withstand a demurrer to the evidence/motion

for directed verdict on the issue of deliberate indifference. Therefore, Defendants' Second Motion for Summary Judgment is granted for the reason that Plaintiff has failed to show "deliberate indifference." This ruling disposes of all claims against all Defendants.

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

THURSDAY, JULY 1, 2010

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

106,374 Estate of Eva June Crowell, Deceased, by and through Anna, M. Boen, Personal Representative v. Board of County Commissioners of The County of Cleveland, State of Oklahoma, Dewayne Beggs, as Sheriff of Cleveland County, State of Oklahoma, Deputy Jeanne Anne Beck, Deputy April Lynn Cummins, Deputy Kenneth Albrecht, Corporal Michael Dean Easley and Corporal Michael Stevenson, Employees of the Cleveland County Sheriff's Office

Rehearing is denied.

CONCUR: Edmondson, C.J., Hargrave, Opala, Kauger; Watt; Winchester, Colbert, Reif, JJ.

DISSENT: Taylor, V.C.J.

No. 10-432

In The

Supreme Court of the United States

SHERIFF DEWAYNE BEGGS, JEANNE ANN BECK, KENNETH ALBRECHT, and MICHAEL STEVENSON,

Petitioners,

v.

ESTATE OF EVA JUNE CROWELL, DECEASED, by and through ANNA M. BOEN, personal representative,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any unconstitutional custom, policy or act of, or knowledge by, the Sheriff, as the final policymaker, was alleged or shown.

2. Whether the Supreme Court of Oklahoma's opinion conflicts with important and settled federal constitutional questions regarding the principle that the doctrine of respondeat superior does not apply in cases brought pursuant to 42 U.S.C. § 1983.

3. Whether the Supreme Court of Oklahoma's opinion conflicts with the state court of last resort of numerous states with regard to principle of respondeat superior under 42 U.S.C. § 1983.

4. Whether the Supreme Court of Oklahoma's opinion conflicts with decisions of the United States Supreme Court, and of the United States Courts of Appeals.

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INTRODUCTION

The Petitioners in this matter would have this Court believe that this is a case about the doctrine of respondeat superior, which it is not. This is a case about Eva June Crowell, an asthmatic inmate housed at the Cleveland County jail in Norman, Oklahoma, who died, according to the medical examiner's office, of an acute asthma attack, after having been recklessly delayed and denied access to her emergency inhaler by the jail employees present at the time, all of whom were acting under the control, direction, and supervision of the Sheriff of Cleveland County. The Respondent has alleged that these actions of the Petitioners, including the Sheriff, constitute deliberate indifference to the deceased's serious medical condition in violation of her constitutional rights and 42 U.S.C. § 1983.

As with any case where the propriety of summary judgment is at issue, this matter is very fact intensive and, in the end, it was the disputed facts presented in the evidentiary materials supplied by the Respondent, not some deviation from the applicable federal jurisprudence, which the Supreme Court of Oklahoma relied upon in reversing the trial court's decision to grant summary judgment. After duly examining the law as it applied to the facts of this case, the Supreme Court of Oklahoma's decision recognized that considering all the evidence presented in the light most favorable to the Respondent, a reasonable fact finder could conclude that both the jail employees *and* the Sheriff acted with deliberate

indifference to the deceased's serious medical needs, in violation of 42 U.S.C. § 1983.

STATEMENT

This appeal arises from the Supreme Court of Oklahoma's decision, filed on January 26, 2010, reversing the trial court's order granting summary judgment in favor of Petitioners.

Respondent Anna M. Boen, Personal Representative of the Estate of Eva June Crowell, deceased, filed her Petition in the District Court of Cleveland County, Oklahoma, on March 22, 2005, for personal injuries and damages sustained by Ms. Crowell from violation of her constitutional rights at the Cleveland County jail.

Petitioners filed a Motion and Brief to Dismiss on August 5, 2005. This Motion was granted as to the state claims against the Petitioners but denied as to the Respondent's federal § 1983 claims, on September 15, 2005.

Petitioners filed their first Motion and Brief for Summary Judgment on February 9, 2007. The Motion was subsequently denied by the trial court on April 9, 2007.

After further discovery, including deposition of the Respondent's medical expert, the Petitioners filed a Second Motion and Brief for Summary Judgment on March 7, 2008. The Second Motion essentially

repeated the arguments of the first motion, adding that the result should be different in this instance because of certain statements made by Respondent's medical expert at deposition.

The Petitioners' Second Motion was denied on June 6, 2008, but the court allowed in its ruling for the Petitioners to request reconsideration at pretrial conference on August 28, 2008. At pretrial, after initially scheduling a trial date, the trial court heard the Petitioners' request to reconsider its previous decision and subsequently sustained the Petitioners' Second Motion for Summary Judgment, finding that the evidentiary material submitted by the Respondent supported only a finding of negligence, and not a finding of deliberate indifference.

The Respondent filed her petition in error with the Supreme Court of Oklahoma appealing the trial court's decision. The case was subsequently assigned to the Oklahoma Court of Civil Appeals, which denied Respondent's appeal on December 18, 2008.

The Respondent appealed the Court of Civil Appeals decision by filing a writ of certiorari with the Supreme Court of Oklahoma, which granted certiorari. On January 26, 2009, the Supreme Court of Oklahoma reversed the decision of the Court of Civil Appeals affirming summary judgment against the Petitioners herein, and held that the § 1983 claims against the Petitioners should proceed to trial.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF OKLAHOMA WAS BASED UPON THE APPLICABLE STATE AND FEDERAL LAW AND THE UNIQUE FACTS OF THE CASE, NOT UPON THE DOCTRINE OF RESPONDEAT SUPERIOR. THE DECISION OF THE SUPREME COURT OF OKLAHOMA DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS REGARDING § 1983 CLAIMS.

The Petitioners primarily argue in their Petition for Writ of Certiorari that the Supreme Court of Oklahoma, in its decision below reversing summary judgment, impermissibly applied the doctrine of respondeat superior and ignored the applicable federal § 1983 jurisprudence in deciding potential liability against the Sheriff in this case.

The doctrine of respondeat superior, which is left undefined in the Petitioner's Petition for Writ of Certiorari, acts to impose liability upon an employer for torts committed by his employees even when the sole nexus between the employer and the tort committed is the employee-employer relationship. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 692 (1978), citing W. Prosser, Law of Torts § 69, p. 459 (4th ed.1971). It is clear from the caselaw presented by Petitioners that the doctrine of respondeat superior does not apply in § 1983 actions. However, the decision of the Supreme Court of Oklahoma at issue in this case simply does not rely upon the doctrine of

respondeat superior. The Respondent has never alleged respondeat superior as a cause of action in this matter, either in her original petition or any subsequent pleading, and the Supreme Court of Oklahoma opinion here at issue never uses the words "respondeat superior" and never holds that the doctrine of respondeat superior applies in any way to the case at bar.

On the contrary, the Supreme Court of Oklahoma opinion considered and applied multiple sources of law, both state and federal, in arriving at its reasoned decision below. The court noted that the Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments," and that multiple United States Supreme Court cases, including *Whitley v. Albers*, 475 U.S. 3121 (1986); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); and *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976), have found that the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.

The opinion cites *Estelle,* and *Farmer v. Brennan*, 511 U.S. 825 (1994), as authority for the principle that "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment under the Eighth Amendment, and the Eighth Amendment applies to prison officials when they provide medical care to inmates. *See Estelle*, 429 U.S. at 423. The court noted that a federal court in *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir. 1988), held that deliberate indifference may be shown when prison officials deny, delay, or intentionally

interfere with medical treatment, and it may also be shown by the way in which prison officials provide medical care.

In considering the issue of the Sheriff's official responsibility, the Supreme Court again considered several applicable federal cases, including *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1987), in which the court found that although an "affirmative link" must be shown between the alleged constitutional deprivation and the actions of a supervisor, the link may be shown in several different ways, including the supervisor's personal participation, his exercise of control or direction, or his failure to supervise, and a plaintiff may meet this burden by showing the supervisor breached a duty imposed by state or local law.

In analyzing whether or not the Respondent had shown enough evidence of the Sheriff's supervisory responsibility to overcome a motion for summary judgment, the Supreme Court of Oklahoma considered several factors, including the applicability of an Oklahoma state statute, 57 O.S. 2001 § 52, to the present case. 57 O.S. 2001 § 52 provides that the sheriff of each county in Oklahoma has a statutory duty to provide "medical care when required, and all necessities for the comfort and welfare of prisoners."

The court concluded that pursuant to *Meade*, this statutory language created a duty on the part of Sheriff in the instant case to provide prisoners, including Ms. Crowell, necessary medical care while

incarcerated at the Cleveland County jail, and his failure to do so could provide the "affirmative link" between his actions and the constitutional deprivation alleged by Petitioners. The court did not hold that 57 O.S. 2001 § 52 provides a basis for finding liability of the Sheriff independently of, or in contradiction to, § 1983 jurisprudence. The court merely recognized that the existence of 57 O.S. 2001 § 52 may be used by a finder of fact to determine whether or not the Sheriff's actions or inactions in this case rose to the level of deliberate indifference as defined by the applicable federal caselaw.

The use of a state statute by the Supreme Court of Oklahoma in its opinion does not conflict with the federal jurisprudence cited by Petitioners in their Petition for Writ of Certiorari. All of the decisions cited by the Petitioners are distinguishable from the unique facts presented in this case, which includes not only the existence of a state statute which imposes a duty of care to every sheriff in Oklahoma, but also the pertinent facts shown in the evidentiary materials presented to the trial court by Respondent, including: the length of Ms. Crowell's incarceration; the jail employees' knowledge of Ms. Crowell's serious asthma condition; the frequency of her requests for her inhaler; the jail employees' refusal to bring Ms. Crowell her emergency inhaler despite her obvious emergency and the panicked requests of her cellmates; the fact that the jail employee responsible for bringing the inhaler insisted on completing a "head count" before responding to Ms. Crowell's medical

emergency; the extraordinary length of time it took jail employees to respond to the emergency; the fact that the emergency inhaler was kept in a locked drawer on the second floor, and the fact that alternative methods of delivering the inhaler to Ms. Crowell were discussed but never implemented. Even the Petitioners, in their Petition for Writ of Certiorari, acknowledge that the Sheriff was the policymaker for the Cleveland County jail.

Yet the Petitioners continuously argue that the Sheriff cannot be held liable for the constitutional violations of his jail employees because he has signed an affidavit purporting he did not personally know of the deceased's medical problems and was not personally present at the time she died of an acute asthma attack. None of the caselaw cited by the Petitioners, including the caselaw related to respondeat superior, holds that a sheriff can only be responsible for constitutional violations committed in his or her presence. To the extent the Sheriff was not personally present at the jail during the events leading to Ms. Crowell's death, he should not be allowed to escape liability as a result of self-imposed ignorance.

Furthermore, no case cited by the Petitioners holds that it is never appropriate to consider state statutes in deciding the sufficiency of factual allegations in § 1983 actions. The cases cited by Petitioners overruling the applicability of state law to § 1983 cases overwhelmingly deal with various attempts by the states involved to impermissibly restrict an inmate's right to pursue redress for violations of § 1983.

Interestingly, in their Petition for Writ of Certiorari, the Petitioners ask this Court on one hand to consider language in the Oklahoma state jail regulations as evidence in support of reversal, but on the other hand to prevent the Supreme Court of Oklahoma to take state law into consideration when deciding potential liability. The Petitioners would use the applicable state law in this matter as both a shield and a sword.

The Supreme Court of Oklahoma decision below was ultimately a primarily factual determination regarding whether the summary judgment granted by the trial court was proper. As the court recognized, summary judgment is only appropriate when there is no substantial controversy as to any material fact. 12 O.S. 2001, ch. 2, app. 1, Rule 13; *Copeland v. Tela Corp.*, 1999 OK 81, ¶4, 996 P.2d 931, 932. The court also noted the language in *Copeland* finding that where liability is based on what the defendants knew or should have known, "self-imposed ignorance" on the part of the defendants is not determinative, and a plaintiff may show the matter that the defendants knew or should have known by circumstantial evidence and inference. *See Copeland*, 1999 OK 81 at ¶8 and 10, 996 P.2d at 933-34.

Nothing in the fact-driven decision of the Supreme Court of Oklahoma in this case conflicts with the decision of another state court of last resort, a United States court of appeals, or the United States Supreme Court, regarding an important question of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 2011